each of the assessors that the compensation awarded was in fact inadequate. The first assessor, Mr. Keith S. Dening, has expressed the opinion that, in the light of the prices prevailing in Imbi Road and other areas for lands suitable for flat development and making suitable allowances, the market value of the land acquired was $4.80 per square foot. The second assessor, Mr. P. M. Varghese, has said that, having regard to the agreed price for Lot 1, the price paid for Lot 2285 and the prices generally for similar land in Kuala Lumpur, he is of the opinion that the market value of the land in question was $6.60 per square foot.

Under section 41(3) of the Act, I direct that each of the assessors be paid a fee of $500.

Applications dismissed.

Solicitors: *Skrine & Co.; Braddell & Ramani.*

ZENO LTD. v. PREFABRICATED CONSTRUCTION CO. (MALAYA) LTD. & ANOR.

[O.C.J. (Raja Azlan Shah J.) March 1, 1967]

[K.L. — Civil Suit No. 287 of 1964]

Companies — Charge on land — Creation of — Failure to register in Land Office — Charge registered with Registrar of Companies — Companies Ordinance, 1940, s. 80.

Land Laws — Caveat — Lien — Equitable mortgage — Collateral security for loan — Collusion — Floating security — Land Code (F.M.S. Cap. 138), s. 134.

The first defendants took a loan of $75,000 from the plaintiffs and executed a mortgage and general charge on February 16, 1962, and as security the defendants deposited with the plaintiffs the title deeds of land in Klang, EMR. 4031 Lot 703, of which they were the registered proprietors. The charge was never registered in the Land Office although it was registered with the Registrar of Companies on March 9, 1962. The plaintiffs lodged a caveat in respect of the said land with the Collector of Land Revenue, Klang, and it was duly recorded in the Register of Document of Title on April 23, 1962. On October 31, 1963 the second defendant obtained judgment for $20,514.87 against the first defendants in a suit and on November 14, 1963 he obtained a prohibitory order against the said land and presented the same to the collector for registration under the provision of the Land Code. The order provided that it was subject to caveats and prohibitory orders. By an order of court dated February 6, 1964 in the same suit the second defendant obtained an order for the sale of the said land by public auction at a reserve price of $25,000. In April 1964 the plaintiffs commenced these proceedings. The first defendants had no other assets and they had not repaid the principal sum of $75,000 nor any interest thereon to the plaintiffs despite a demand for payment made on February 10, 1964. The plaintiffs alleged that they gave notice to the second defendant of their prior lien on the said land but nevertheless the latter proceeded to by-pass their rights and interests in the matter. The plaintiffs sought for judgment in the sum of $82,500 including interest against the first defendants, a declaration that the plaintiffs' lien on the land had priority of right, claim and interest over that of the second defendant's prohibitory order, or order of sale by public auction, alternatively the land be auctioned with a reserve price of $90,000. The first defendants did not enter appearance and judgment by default was entered against them.

Held: (1) the charge executed by the first defendants on February 16, 1962 in a favour of the plaintiffs was void for all purposes with the consequence that the money secured thereby became immediately payable;

(2) as the document of title was deposited with the plaintiffs, it was clear that there was the intention to create a lien over the land in accordance with section 123 of the Land Code;

(3) the nature of the plaintiffs' interest in the land was a lien analogous to an equitable mortgage; and an equitable interest in land was capable of being caveated;

(4) the caveat established priority and the onus was therefore on the holder of a subsequent equity to show facts which rendered it inequitable for the holder of a prior equity to insist as against him on that priority. Although priority in time is the ordinary test, in the final analysis where evidence discloses some act or omission on the part of the holder of a prior equity the rule that "who has the better equity" as stated by Parker J. in *Crosbie-Hill* v. *Sayer* (7) applied.

Discussion on floating charge.

Cases referred to:—

(1) *Johore Para Rubber Co. Ltd.* v. *Registrar of Companies, Malayan Union* [1948] M.L.J. 135 at 136.

(2) *Selibin Tin Syndicate Ltd.* v. *Registrar of Companies* (1921), 2 F.M.S.L.R. 262.

(3) *Raman Chettiar* v. *Muthiah Chetty* (1923), 3 F.M.S.L.R. 177.

(4) *Palmer* v. *Wiley* (1906), 23 M.N. (N.S.W.) 90, 91.

(5) *Ngan Khong* v. *Bamah* [1935] M.L.J. 167.

(6) *Arunasalam Chetty & Ors.* v. *Peah Ah Poh & Ors.* [1937] M.L.J. 17.

(7) *Crosbie-Hill* v. *Sayer* [1908] 1 Ch. 866, 875.

(8) *Barry* v. *Heider* (1914), 19 C.L.R. 197.

(9) *Great Western Permanent Loans* v. *Friesen* [1925] A.C. 208.

(10) *Abigail* v. *Lapin* [1934] A.C. 491.

(11) *Butler* v. *Fairclough* (1917), 23 C.L.R. 78.

(12) *National Bank of Australasia* v. *United Hand-in-Hand Co.* (1897), 4 App. Cas. 391.

(13) *Woon Poon Hoh* v. *Muthiah Chetty* [1934] M.L.J. 121.

(14) *Murugappa Chetty* v. *Seenivasagam* [1936] M.L.J. 217.

(15) *Gan Khor* v. *Soan bin Pelita* [1935] M.L.J. 158 at p. 159.

(16) *Noble* v. *Noble & Ellis (No. 2)* [1964] 2 W.L.R. 349, 354, 355.

(18) *Government Stock & Ors. Investment Co.* v. *Manila Railway H.L.* (1897), 66 L.J. Ch. 102, 105.

(19) *Biggerstaff* v. *Rowatt's Wharf Ltd.* [1896] 2 Ch. 93.

(20) *Wallace* v. *Avershade* [1899] 1 Ch. 891.

CIVIL SUIT.

Chooi Mun Sou for the plaintiffs.

K. L. Devaser for the 2nd defendant.

Cur. Adv. Vult.

Raja Azlan Shah J.: In the event that has happened, the first issue to be decided in the present case is whether the charge executed by the first defendants on 16th February 1962 in favour of the plaintiffs is valid.

The facts are as follows. The first defendants, a limited company subject to the provisions of the Companies Ordinance, took a loan of $75,000 from the plaintiffs and executed a mortgage and general charge, and as security they deposited the title deed for land held under EMR. 4031, Lot 703, in the Mukim of Bukit Raja, Klang, in the State of Selangor, of which the first defendants are the registered proprietors. The charge was never registered in the Land Office although it was registered with the Registrar of Companies on 9th March 1962. The plaintiffs lodged a caveat in respect of the said land with the Collector of Land Revenue, Klang, and it was duly recorded in the Register of Document of Title on 23rd April 1962. On 31st October 1963 the second defendant obtained judgment in the sum of $20,514.87 against the first defendants in Civil Suit No. 261 of 1962, and on 14th November 1963 he obtained a prohibitory order against the said land and presented the same to the Collector of Land Revenue for registration under the provisions of the Land Code. The prohibitory order provided that it was subject to caveats and prohibitory orders. By an order of the court dated 6th February 1964 in Civil Suit No. 261 of 1962 the second defendant obtained an order for the sale of the said land by public auction at a reserve price of $25,000. In April 1964 the plaintiffs issued their writ against both defendants.

The first defendants are said to have no other assets. They have not repaid the principal sum of $75,000 nor any interest thereon to the plaintiffs despite a demand for payment made to them on 10th February 1964. Furthermore, the plaintiffs state that they gave notice to the second defendant of their prior lien on the said land but nevertheless the second defendant proceeded to by-pass their rights and interests in the matter.

The plaintiffs now pray for judgment in the sum of $82,500 including interest against the first defendants, a declaration that the plaintiffs' lien on the said land has priority of right, claim and interest over that of the second defendant's prohibitory order, an order to set aside the order of sale dated 6th February 1964, alternatively that the said land be auctioned with a reserve price of $90,000.

The first defendants did not enter appearance and judgment by default was accordingly entered against them.

Mr. Devaser on behalf of the second defendant argued that the charge was not "created" within the meaning of section 80 of the Companies Ordinance 1940 and is therefore void. Counsel submitted that for the charge to be "created" under the Ordinance it must be created in conformity with the provisions of the Land Code. Counsel concluded by arguing that if the charge is void it is void for all purposes and the plaintiffs are not entitled to rely on any part of it.

Section 80(1) of the Ordinance provides that every charge created after the fixed date, namely, 10th February 1915, by a company registered in the Federation shall be void against any creditor unless the prescribed particulars of the charge together with the instrument, if any, by which the charge is created or evidenced are delivered to or received by the registrar for registration within 21 days after the date of its creation. Section 80(10)(c) provides that a charge on land situated in any Malay State shall be deemed to be created at a time when the charge is created pursuant to section 90 of the Land Code (Cap. 138).

Therefore, in considering the date of creation of a charge on land it is necessary to look into the relevant provisions of the Land Code. (See *Johore Para Rubber Co. Ltd.* v. *Registrar of Companies, Malayan Union* [1]). Section 55 of the Code, *inter alia*, provides that land comprised in any entry of the Mukim Register shall be subject to the provisions of the Enactment and shall not be capable of being charged or dealt with except in accordance with the provisions of the Enactment. Section 90 provides the manner of registering an instrument. Section 96 provides that no land shall be charged until the transaction is registered in accordance with the provisions of the Enactment. These sections make it perfectly plain that for the purpose of that Enactment any attempt to create a charge on land otherwise than by registration is void though doubtless for other purposes the execution of such a document would serve to create certain rights and liabilities. (See *Johore Para Rubber Co. Ltd.'s* case, *supra*). In the *Johore* case the company took a loan from a finance board and on 15th August 1947 executed in their favour a memorandum of charge on land situated in Johore. The charge was duly registered at the Registry of Titles at Johore Bahru on 9th September 1947 and on the same day the company despatched by post a copy of the charge to the Registrar of Companies for registration under section 81 of the Companies Ordinance, 1940. The registrar refused to register the charge, claiming that he was precluded from doing so by section 80(1) of the Ordinance. It was there held that by virtue of section 63 and section 65 of the Johore Land Enactment, which are in *pari materia* with section 55 and section 96 of the Land Code, the charge was created on the day it was registered in the Registry in Johore Bahru on 9th September 1947 and as a

copy of the charge was addressed to the Registrar of Companies by post the same day and was received by him within the period of 21 days the registrar should register the charge.

In my view the *Johore* case is not dissimilar to the instant case and there is no reason why I should not adopt the reasoning therein stated. However, a point which, at first hand, has caused me some anxiety is the case of *Selibin Tin Syndicate Ltd.* v. *Registrar of Companies* [2] which held exactly the opposite view. In that case, which was briefly reported, the company executed a charge over sundry of the company's mining leases and sub-leases on 21st July 1921 to secure repayment of the sum of £29,500 and interest. The charge was duly registered in the Land Office on 3rd August 1921. On the return of the said charge a duplicate thereof together with the particulars required by section 93 of the Companies Enactment (F.M.S.) No. 20 of 1917 was sent to the Registrar of Companies and reached him on 18th August 1921. The registrar refused to register the particulars on the ground that the period of 21 days required by section 93 had elapsed since the date of signing the said charge. It was held that a charge is created when executed and that the time allowed by section 93 of the Companies Enactment begins to run from that date and not from the date of registration in the Land Office.

There seems to be an apparent conflict between those two cases. However, it is of interest to note that the *Selibin* case was not considered in the later case of *Johore Para Rubber Co. Ltd.* A close examination of the Companies Enactment, 1917, discloses that there are no provisions corresponding to section 80(10)(c) of the Companies Ordinance, 1940. In my view, section 93 of the Companies Enactment, 1917, was taken from section 93 of the United Kingdom Companies (Consolidation) Act, 1908, which is silent on the definition of the word "create". The omission is deliberate for the simple reason that in the United Kingdom there are no provisions for a system of registration of titles to land similar to the Torrens System of registration. The two cases can therefore be said to have been decided under different laws and it is to that extent that they can be distinguished. In any event I would prefer to adopt the reasoning in the *Johore* case in view of the express statutory provisions of section 80(10)(c) of the Companies Ordinance, 1940.

In the circumstances of this case it is quite obvious that the charge is void for all purposes with the consequence that the money secured thereby becomes immediately payable (see section 80(1) of the Companies Ordinance, 1940).

Mr. Chooi Mun Sou, on behalf of the plaintiffs, argued that he was not claiming as chargee under the Land Code but as a lien holder. The case of *Raman Chettiar* v. *Muthiah Chetty* [3] was cited as being on all fours with the present case. Mr. Devaser on the other hand submitted that if that was the case then the lien by virtue of section 134 of the Land Code was created after registration of the caveat and not by execution of deposit of title. Counsel therefore argued that the plaintiffs must state, as is required under the section, that they intended to create a lien. What in effect the plaintiffs were saying was that since the first defendant had deposited with the plaintiffs the issue document of title there was the intention to create a lien over the mortgage and general charge, and that, it was submitted by Mr. Devaser, was not enough. Another argument propounded by Mr. Devaser was that the plaintiffs had violated the provisions of section 167 of the Land Code in that they had failed to state the nature of the interest in the land and the ground upon which their claim was founded. The ground which the plaintiffs claimed was that they had got a lien over the mortgage and general charge and that, counsel submitted, was in general terms and therefore insufficient.

The law regarding the creation of a lien under the Land Code is well settled. Under section 134 of the Code a lien over any land can only be created by the deposit of the relevant issue of document of title by the proprietor followed by a caveat by the holder of the lien which requires delivery of the issue document of title with the caveat for a memorial thereto to be made. (See *Das'* Torrens System in Malaya, p. 348). In my view, since intention is always a matter of inference from all the relevant circumstances, once the issue document of title is deposited with the depositee that is evidence of intention to create a statutory lien for purposes of the section. In the present case the first defendant company executed an unregistered mortgage and general charge as security of the loan and clause 2(6) thereof states:—

> "The mortgagor further hereby deposit the Title for Land held under EMR. 4031 for Lot 703 in the Mukim of Bukit Raja District of Klang with the lender as security for principal and interest and the lender may lodge a caveat with the Collector for Land Revenue to create a lien".

From this document and the fact that the document of title was deposited with the plaintiffs, it is abundantly clear that there was the intention to create a lien over the land in accordance with section 134 of the Code.

Objection was taken by Mr. Devaser that the caveat was defective in that it did not specify the nature of the interest in the land and the grounds on which the claim was made. Counsel referred me to a valuable treatise on "The Drafting of Caveats" by John Baalman in the *Australian Law Journal*, Vol. 31, p. 17, and to Vol. 9 of the same journal at p. 328, "Caveat against dealings — Quantum of Estate or Interest". Those articles, to my mind, go no

further than re-stating that the statutory requirements of filing a caveat which corresponds to section 167 of our Code must be strictly complied with. Section 167 reads:—

"A caveat shall state the nature of the interest in the land and the ground upon which the claim is founded, shall be verified by the affirmation of the caveator or his agent, shall contain an address within the Federated Malay States at which notices may be served, and may be in the Form in Schedule XXXV".

Thus, if a defective caveat is lodged it can be treated as waste paper: *per* Pring J. in *Palmer* v. *Wiley*.[4] Thus a caveat couched in vague terms such as "claiming an equitable interest" or claiming "estate or interest, documentary title" without particularising it, was held to be bad and the caveat removed. (See *Das'* Torrens System in Malaya, p. 344).

It is now necessary to look into the caveat in the present case to see whether it complies with the provisions of section 167 of the Code. The plaintiffs here claimed a lien, and I quote:—

"A lien on the ground that P.C.C. Prefabricated Construction Company (Malaya) Limited the proprietors did deposit with us the issue document of title deed held under Entry in the Mukim Register No. 4031 Lot No. 703 in the Mukim of Bukit Raja in the District of Klang with intent to create a lien over mortgage and general charge dated the 16th day of February, 1962, under Item 6. A copy of the said mortgage and general charge is attached hereto and marked 'A'".

What does the caveat mean? To me it cannot mean anything else than exactly what it says, that is, a lien on the ground that the first defendants had deposited with the plaintiffs the issue document of title and that is substantial evidence of an intention to create a lien. Therefore, the nature of the plaintiffs' interest in the land is a lien, which has been held in *Ngan Khong* v. *Bamah* [5] as "analogous to an equitable mortgage". It is an equitable interest in land capable of being caveated. (See also *Arunasalam Chetty & Ors.* v. *Peah Ah Poh & Ors.*[6]). The grounds on which the claim is based is also evident from the caveat. It is in effect in the nature of a collateral security for the loan. Although the caveat fails to say expressly that it affords collateral security, I think that is implicit. It says that the issue document of title is deposited with intention to create a lien under clause 6 of the mortgage and general charge which is attached to the caveat. To my mind it states the substance of the claim. The grounds of the claim are satisfied if the caveat states the substance of the claim. It is a matter of substance and not of form. No technical or precise language need be used.

In my view the caveat establishes priority and the onus is therefore on the holder of a subsequent equity to show facts which render it inequitable for the holder of a prior equity to insist as against him on that priority. Although priority in time is the ordinary test, in the final analysis where evidence discloses some act or omission on the part of the holder of a prior equity the rule that "who has the better equity" applies; *per* Parker J. in *Crosbie-Hill* v. *Sayer*.[7]

An act which postpones a prior equity arises where a proprietor by his conduct had given a duly executed registerable instrument to the transferee who subsequently mortgaged the land to a *bona fide* mortgagee. (See *Barry* v. *Heider*;[8] *Great Western Permanent Loan Co.* v. *Friesen*.[9] In *Abigail* v. *Lapin* [10] the Privy Council held that where the proprietors of land in New South Wales had transferred them to the nominee of the creditor together with the certificates of title but had lodged no caveat, their equity should be postponed to that of the mortgagee because the proprietors had armed their transferee with power to deal with the lands as owner.

The only omission treated in the decided cases is the omission to lodge a caveat. It was observed in *Butler* v. *Fairclough* [11] that the failure to file a caveat constitutes negligence so as to defeat the prior equity for it enables the registered proprietor, "holding his certificate of title in his pocket to hawk the certificate around the town" and obtaining advances of money on the face of the clean certificate. In *Abigail* v. *Lapin, supra,* their Lordships of the Privy Council found themselves in agreement with the minority judgment of the High Court that, apart from priority in time, the test for ascertaining which encumbrancer had the better equity must be whether either had been guilty of some act or default which prejudiced his claim, and in the case under review the holders of the prior equity "reinforced the apparently absolute ownership of the registered proprietor by neglecting the well-known method of protecting their rights and interests by means of a caveat". (See 8 A.L.J. 198, 200).

However, Mr. Devaser does not rely on similar decided cases to found his claim that his client had a better equity. His contention is that the plaintiffs had entered possession of the first defendants' premises through their watchman and as such were to be regarded as a mortgage in possession with its attendant responsibilities and liabilities; in particular, counsel submitted, the plaintiffs were strictly accountable for any acts of waste. Counsel strongly relied on the provisions of section 137 of the Land Code and the case of *National Bank of Australasia* v. *United Hand-in-Hand Co.*[12] In my view, that section and that case cited and the local cases of *Woon Foon Hoh* v. *Muthiah Chetty* [13] and *Murugappa Chetty* v. *Seenivasagam* [14] are not applicable in the instant case as it is quite clear that no default was made in the maintenance and cultivation of the land and that no application for a certificate to the collector was made that there was such default. In any event

that section does not authorise a chargee to enter into possession of country land comprised in an E.M.R. or of town land or village land.

With regard to the contention that the plaintiffs are analogous to a mortgagee in possession, it is sufficient if I cite a passage of Thomas C.J. in *Gan Khor* v. *Soan bin Pelita* [15]:—

"It must be remembered that a charge is a very different transaction to a mortgage. There is no such thing as a mortgage of land known to the law of the Federated Malay States. Charges alone are recognised. The rights arising from a charge are contained in the Land Code. It is not possible to seek to introduce the elements of an English mortgage into a charge as provided by the law of the Federated Malay States, and therefore, apart from any express powers it is not correct to say that a chargee has the right to enter into occupation".

Mr. Devaser then argued that there was fraud in the sense that there was collusion between the plaintiffs and the first defendants to defraud the latter's creditors. Among other things, counsel seemed to found his contention on the premise that Loebis, who is the director of both companies, took no step to enter appearance or contest the claim when the plaintiffs served notice of demand on the secretary on behalf of the first defendants and that no action was taken to enforce the charge until after the second defendant had taken execution proceedings against the first defendants. Such was the contention of counsel, but I am unable to accede to it. It seems to ignore the nature and character of the act of which the second defendant complained and to disregard the principles on which courts of equity proceed when dealing with fraud. It will not be out of place to cite a passage from the judgment of Scarman J. in *Noble* v. *Noble & Ellis (No. 2)* [16] whose statement of law was approved in the Court of Appeal.[17] The court was there dealing with collusion in respect of a matrimonial proceeding. But in pointing out the distinction between a case of collusion and a case of non-collusion the learned judge uses very plain language and his remarks may be useful in clearing the ground in the present case.

"In my opinion the answer to the problem of distinguishing between a collusive and a non-collusive bargain in any given case depends upon a careful and accurate analysis of the bargain made. There must, of course, be a bargain. It must be construed like any other contract, that is to say, full weight must be given to its implied as well as to its express terms".

In another passage he said:—

"A collusive bargain is one with a corrupt intention. It is an agreement under which a party to the suit for valuable consideration has agreed either to institute it or to conduct it in a certain way: for example, the reluctant petitioner induced by the offer of some benefit to take proceedings against an eager respondent, or — closer to this case — a co-respondent induced by a promise of some benefit not to defend a charge of adultery, or stronger still, to provide evidence or to bear witness at the trial against the respondent. If, upon a fair consideration of the circumstances, the parties intend by their agreement to match institution of suit or any aspect of its conduct with the provision of some benefit to the party instituting or in that aspect conducting the suit, here is, in my opinion, collusion. Unless there is this matching of forensic proceeding against valuable consideration, there is no collusion. The 'dishonest purpose' of which Bucknill J. spoke in *Scott* v. *Scott* [1913] P. 52, 54; the 'element tending to pervert the course of justice' which Willmer J. recognised as necessary in *Lowndes* v. *Lowndes* [1950] P. 223; 231; each is to be found in the parties' intention that for valuable consideration one of them will either take or refrain from taking a forensic step otherwise open to him in the suit. That is the corrupt intention, that the element in the bargain tending to pervert the course of justice. I would add that to refrain from raising a defence or to drop a charge while continuing with others, though negative acts, are of course as much part of the conduct of a suit as positive steps taken to institute or prosecute it, and if done or agreed to be done for valuable consideration would be collusive".

Applying the above principles and treating the onus as upon the second defendant to establish fraud which is on the higher balance of probabilities, it cannot rationally be said that the circumstances prevailing in the present case constitute fraud in the sense propounded by counsel. In my opinion the existence of a collusive bargain is lacking. There is not a shred of evidence of an agreement to procure the initiation or to provide for the conduct of the suit. There is already evidence that the plaintiffs have passed a resolution to approve the sum of $75,000 loaned to the first defendants (see resolution by circular letter dated 16th February 1962).

Mr. Devaser finally admitted that the memorandum of charge resembles a floating charge on the moveable assets of the first defendant and argued that those assets technically in their possession had either been lost or fritted away by the first defendants with the connivance, abetment, negligence or wilful default of the plaintiffs and therefore the plaintiffs are liable to reduce their claim by a corresponding amount of such loss.

It is an accepted principle of law that a floating charge is an equitable charge on the assets for the time being of a going concern. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern or until the person in whose favour the charge is created intervenes. His right to intervene may of course be suspended by agreement, but if there is no agreement for suspension he may exercise his right whenever he pleases after default. (*Per* Lord Macnaghten in *Government Stock &c. Investment Co.* v. *Manila Railway, H.L.*[18] Until such intervention the company carries on as if the charge were non-existent: see *Biggerstaff* v. *Rowatt's Wharf Ltd.*[19]; *Wallace* v. *Avershade.*[20] In the present case the memorandum of charge gives a floating security over all the undertaking and goodwill of the first defendants and all its property, assets, and rights whatsoever and wheresoever both present and future (excluding the premises

charged by way of legal mortgage or specifically mortgaged or charged or specifically assigned). There is evidence that the first defendants' business ceased in the latter part of 1962 when their managing director, Mr. Lucas, disappeared. The plaintiffs thereupon placed a watchman at the defendant's site at Batu Tiga. In that event I agree with counsel's submission that the plaintiffs had intervened with the consequence that the floating security had crystallised and became a fixed charge. Now, what is the position of the plaintiffs in relation to the fixed charge? It was suggested by Mr. Devaser that they are analogous to a trustee. No authorities were advanced to substantiate that proposition. I feel that I cannot bind myself to such proposition. In my view, the plaintiffs are in a position of a receiver. In fact, the instrument creating the charge enables the plaintiffs to appoint a receiver "at any time after the principal monies have become payable". The duties of a receiver are in my view subject to but not in derogation of the powers conferred by the instrument creating him. The dominant power is that of taking possession of the property covered by the charge and collecting the income derived therefrom, if any. Subject to that instrument, the general powers of the receiver are that he must exercise the same care of the property as an ordinary prudent businessman would in regard to his own property and refrain from speculating; he is responsible for any loss caused by his negligence or by his wilful default, but will not be liable for loss or mistake after he has acted honestly and without negligence; he is also a trustee for any money due from himself as receiver.

It was suggested by Mr. Devaser that the tools were looted because of the negligence of the plaintiffs and that no credit notes were taken in respect of the electric calculator, air-conditioner, and the lorry; further, the plaintiffs must account for the refrigerator given to Lucas and the proceeds of sale of the motor-car which was disposed of by Lucas, and therefore a corresponding amount of depreciation of the assets must be taken into account for purposes of the present claim. I would be glad to accede to such proposition if and when the moveable assets are to be considered in ascertaining priorities. In the present case we are only concerned with a lien on the land in question and therefore when the time arises counsel's submission will be considered.

In the circumstances there will be judgment for the plaintiffs in the sum of $82,500 including interest against the first defendants, a declaration that the plaintiffs' lien on the said land has priority of right, claim and interest over that of the second defendant's prohibitory order, and an order for the sale of the said land under the provisions of section 257 of the National Land Code by way of public auction within thirty days hereof. The registrar is required to fix the reserve price for the purpose of the sale. Costs to the plaintiffs.

Judgment for the plaintiffs.

Solicitors: *Chooi & Co.; K. L. Devaser & Co.*

LEOW BOKE CHOOI v. ASIA MOTOR CO. LTD.

[A.C.J. (Gill J.) March 6, 1967]

[K.L. — Civil Appeal No. 1 of 1967]

Practice and Procedure — Service — Order for substituted service of summons — Failure to post copies of summons etc. on notice board of court house in Kuala Lumpur as required by order of court — Effect of — Whether judgment obtained irregular.

Practice and Procedure — Judgment — Ex parte judgment — Setting aside.

The plaintiffs, respondents herein, filed an action against the defendant-appellant in the Sessions Court in November 1964 for the recovery of a sum of $1,175.50 for goods sold and delivered and services rendered. As the summons could not be served on the defendant personally, the plaintiffs obtained an order for substituted service by posting copies of the summons and the statement of claim together with a sealed copy of the order on the notice board of the court house, Kuala Lumpur, and on a conspicuous part of a named premises in Kuala Trengganu. The order was only posted at the premises as required but no posting was done on the notice board of the court house, Kuala Lumpur. When the action came for hearing the defendant failed to appear in court and judgment was accordingly made against him for the amount claimed. His application to set aside the judgment having been dismissed, the defendant appealed to the High Court.

Held: the learned president had overlooked the fact that the order of substituted service had not been complied with in that no copies of the summons, the statement of claim and the order were posted on the notice board of the court house in Kuala Lumpur. The effect of such non-compliance with the order was that there had been no good and sufficient service on the defendant, so that the plaintiffs had obtained judgment against the defendant irregularly. The appeal should be allowed and the order of the learned president of the Sessions Court set aside.

Cases referred to:—

(1) *Anlaby & Ors.* v. *Praetorius* [1888] 20 Q.B.D. 764.

(2) *Craig* v. *Kanseen* [1943] 1 All E.R. 108.

CIVIL APPEAL.

G. S. Nath for the appellant.

Thoo Chow Thye (Miss) for the respondents.

Gill J.: This was an appeal against an order of the President, Sessions Court, Kuala Lumpur dated 4th November, 1965 dismissing the appellant-defendant's application to set aside a judgment which was entered against him in favour of the respondents-plaintiffs in the sum of $1,175.50 on 24th March, 1965.

The circumstances leading up to the application were as follows. The plaintiffs filed an action against the defendant in the sessions